

**STATE OF MICHIGAN
IN THE SUPREME COURT**

In the matter of the Complaint of the
CARRIER CREEK DRAIN DRAINAGE DISTRICT
for condemnation of private property for
drainage purposes in Eaton County, Michigan.

**APPELLEE'S BRIEF IN REPLY
TO THE
MICHIGAN ASSOCIATION OF
REALTORS®'
SUPPLEMENTAL *AMICUS*
CURIAE BRIEF**

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

LAND ONE, L.L.C.,

Defendant-Appellant.

Supreme Court Docket No. 130125
Court of Appeals Docket No. 255609

Eaton County Circuit Court
Lower Court File No. 03-67-CC
Hon. Thomas S. Eveland

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

ECHO 45, L.L.C.,

Defendant-Appellant.

Supreme Court Docket No. 130126
Court of Appeals Docket No. 255610

Eaton County Circuit Court
Lower Court File No. 03-68-CC
Hon. Thomas S. Eveland

CARRIER CREEK DRAIN DRAINAGE DISTRICT,

Plaintiff-Appellee,

v

LAND ONE, L.L.C.,

Defendant-Appellant,

and

STANDARD FEDERAL BANK,

Defendant.

Supreme Court Docket No. 130127
Court of Appeals Docket No. 255611

Eaton County Circuit Court
Lower Court File No. 03-69-CC
Hon. Thomas S. Eveland

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STATEMENT OF FACTS

Defendants-Appellants Land One, L.L.C., Echo 45, L.L.C., Land One L.L.C., and Standard Federal Bank, f/k/a Michigan National Bank, (“Appellants”) have applied for leave to appeal from a Court of Appeals’ November 3, 2005, decision, affirming the Circuit Court for the 56th Judicial Circuit’s determination that Appellants’ claim for additional compensation based upon a purported loss of a possible zoning reclassification was a compensable damage claim, which was waived for failure to be disclosed pursuant to MCL 213.55(3).

On June 9, 2006, this Court issued an Order indicating it would entertain oral argument on the Appellants’ application for leave pursuant to MCR 7.302(G)(1). *Carrier Creek Drain Dist v Land One, L.L.C.*, 2006 Mich. LEXIS 1192 (June 9, 2006). The same Order also invited the parties and *amicus curiae* to submit supplemental briefs which avoid a “mere restatement of the arguments made in their application papers.” *Id.* Plaintiff-Appellee Carrier Creek Drainage District (“Appellee”) submitted a Supplemental Brief on July 21, 2006, but Appellants declined the Court’s invitation. On July 21, 2006, the Michigan Association of REALTORS® filed a Motion for Leave to File a Brief *Amicus Curiae* in Support of Appellants’ Application for Leave to Appeal, and attached its Brief to the Motion. The instant Brief is submitted in response and opposition to the Association’s most recent Brief.

STATEMENT OF THE QUESTION PRESENTED

Plaintiff-Appellee presents the following statement of the question presented:

- I DOES MCL 213.55(3) REQUIRE A LANDOWNER TO
PROVIDE NOTICE TO THE CONDEMNING
AUTHORITY OF A CLAIM FOR COMPENSATION
BASED UPON THE LOST OPPORTUNITY TO
DEVELOP ITS PROPERTY IN ACCORDANCE WITH
A SPECIFIC ZONING CLASSIFICATION THAT HAS
NOT BEEN ASSIGNED TO THAT PROPERTY?**

The Court of Appeals says “Yes.”

The Trial Court says “Yes.”

Plaintiff-Appellee says “Yes.”

Defendants-Appellants say “No.”

Amicus curiae, Michigan Association of REALTORS® says “No.”

STANDARD OF REVIEW

The appropriate standard of review as to the interpretation of statutory provisions, including MCL 213.55(3), is *de novo*. *People v Clay*, 468 Mich 261 (2003).

ARGUMENT

I. MCL 213.55(3) REQUIRES A LANDOWNER TO PROVIDE NOTICE TO THE CONDEMNING AUTHORITY OF A CLAIM FOR COMPENSATION BASED UPON THE LOST OPPORTUNITY TO DEVELOP ITS PROPERTY IN ACCORDANCE WITH A SPECIFIC ZONING CLASSIFICATION THAT HAS NOT BEEN ASSIGNED TO THAT PROPERTY.

The Michigan Association of REALTORS® (the “Association”) would have this Court believe that the present case is relevant to a factual setting where “property owners . . . receive offers from condemning agencies for their property and, without a professional appraisal, are unaware of all of the factors that may affect their property’s value”. See Association’s Motion for Leave to File a Brief Amicus Curiae, dated July 21, 2006, p 1, para. 3. This is not such a case. Neither Appellee nor the Courts below ever contended or concluded that MCL 213.55(3) requires a property owner to submit a written claim for an item of compensable property or damage of which the owner is unaware. Here the item allegedly missing from Appellee’s good faith offer was the lost opportunity to develop property in accordance with a zoning classification different in kind and character from the classification assigned that property at the time it was taken. This hypothetical zoning classification was subjectively selected by, and known only to, Appellant. The possibility that it might someday be assigned to the subject parcel in the future was nowhere reflected in a pending application for rezoning, a future land use map or any other source readily obtainable by Appellee or its professional appraiser.

The Association contends that “[t]he only item of property taken here is the land; the only damage at issue is the loss to the property owner of the value of that same parcel of real property.” Association’s Brief Amicus Curiae dated July 21, 2006 (“Association’s Brief”), at p. 2. This oversimplification ignores the definition of property given by the Legislature that specifically includes “property rights whether real, personal, or mixed”. MCL 213.51(i). The “property right”

for which Appellants claim they should have been compensated was the lost right to develop their land under an assumed but inapplicable zoning classification.

The Association correctly quotes the Uniform Condemnation Procedures Act (the “UCPA”), MCL 213.55(3), for the proposition that a property owner must file a written claim with the agency for each item of compensable property or damage for which the owner intends to claim a right to just compensation. But the success of its arguments largely depends upon ignoring the Legislature’s use of the word “items” in the phrase “...did not include or fully include 1 or more *items* of compensable property or damage...” The insurmountable obstacle facing Appellants and the Association is that unambiguous language contained in statutes must be applied as written and no word can be rendered meaningless or nugatory by judicial construction. *Gladych v New Family Homes, Inc.*, 468 Mich 594, 597; 664 NW2d 705 (2003), *Pohutski v City of Allen Park*, 465 Mich 675, 683-684; 641 NW2d 219 (2002). The word “item” means “[a] single article or unit in a collection”. *American Heritage Dictionary*, 4th ed., p 930 (2000). Stated differently, an “item” is “one of the distinct parts of a whole . . . each thing specified separately in a list or in a group of things that might be listed or enumerated.” Webster’s Ninth New Collegiate Dictionary, p 643 (1989).

Counsel for Appellee confess they are somewhat baffled by the Association’s observation:

The law makes clear that the possibility of rezoning is an issue in determining the value of an item of property taken in the condemnation, not in itself, a separate item of property or “damage”. There is a separate question in this case, not addressed in this Brief, of whether there was a reasonable possibility of rezoning that would affect the value of Echo 45’s land. That question is distinct. Even if Echo 45’s showing as to the possibility of rezoning was unconvincing, the trial court should have admitted that evidence and weighed it accordingly. Association’s Brief at p. 4

An issue in determining the value of an item of property not a separate item of property or damage? This is sophistry. The possibility of rezoning to a classification not presently assigned is

speculative and valueless or it is factually supportable and capable of being valued. To determine in which category a particular possibility falls one must know: (1) what zoning classification is being contemplated, and, (2) what facts render that rezoning reasonably attainable. In condemnation cases where a landowner claims an enhanced property value based upon such a possibility he, not the condemning authority, possesses “sufficient information and detail to...evaluate the validity of the claim and to determine its value”¹. This is clearly the kind of information the Legislature required to be disclosed when it amended MCL 213.55 to add subsection (3).

Appellee acknowledges that post-filing discovery can be utilized to reveal a landowner’s position regarding an appropriate rezoning for the property at issue and uncover facts the owner relies upon to support that opinion. But post-filing discovery is not accompanied by the right to supplement an agency’s original good faith offer and thereby control its exposure to pay the landowner’s maximum reimbursable attorney fees under MCL 213.66. Affording condemning agencies an opportunity to minimize their risk relative to these expenses is a primary objective of the statute under review.

Appellee agrees with many of the legal propositions contained in the Association’s Brief. In fact, they support the decisions reached by the trial court and the Court of Appeals. Among these propositions are the following:

- *“[I]n the absence of the zoning ordinance, [the owners] would have the right to make any desired use of their premises not amounting to a nuisance.”* Association’s Brief at p. 8; Emphasis added; Citations omitted.

¹ The subjective intent of Appellant to either pursue a rezoning or assert that one was reasonably obtainable was unknown to Appellee when it formulated its good faith offer. Nothing in Delta Township’s present or future land use maps indicated that such a rezoning was being contemplated by anyone. No petitions for rezoning had been filed so none were a matter of public record.

- “[B]ecause [fair market] value depends upon the ‘purposes...for which it is capable of being used’...‘land use regulations must be considered because they restrict the uses to which the property may lawfully be devoted.’” Association’s Brief at pp. 8-9; Emphasis added; Citations omitted.
- An evaluation of just compensation “should reflect not only the purpose for which the property has theretofore been used, but other uses which might render it more profitable....Obviously the more profitable operation must be one allowed by law to be carried out on the premises. Thus *if existing zoning restrictions preclude a more profitable use, ordinarily such use should not be considered in the evaluation.*” Association’s Brief at p. 9, quoting from *US v Meadow Brook Club*, 259 F2d 41, 44-45 (CA 2, 1958); Emphasis added; Citations omitted.
- “[C]onsideration of the possibility of other uses or of other zoning does not mean ‘that speculative future uses incompatible with existing zoning are to be assigned a valuation.’” Association’s Brief at p.11.
- “[E]vidence demonstrating the likelihood of a zoning modification...may be relevant in determining just compensation. However...the relevance of any such evidence is wholly dependent on whether, and how, **the particular factor at issue would have affected market participants on that date.**” Association’s Brief at pp. 12, quoting from *Michigan Department of Transportation v Haggerty Corridor Partners Limited Partnership*, 473 Mich 124, 136; 700 NW2d 380, 387 (2005) Emphasis added; Italics in original.

As Chief Justice Taylor noted in *Silver Creek Drain Dist v Extrusions, Inc*, 468 Mich 367, 377; 663 NW2d 436 (2003), a “determination of ‘just compensation’ require[s] the consideration of

all the multiplicity of factors that go into making up value”. This multiplicity of factors may include the reasonable possibility of a rezoning. But consideration of such a factor necessarily assumes the one making a just compensation determination knows what alternative zoning classification is contemplated and what facts render it reasonably possible. The critical importance of this knowledge is underscored by the Association’s own citation to *Consumers Power Co v Allegan State Bank*, 20 Mich App 720, 744-45; 174 NW2d 578, 591 (1969):

The market value of land or real estate is the highest price estimated in terms of money that the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying ***with knowledge of all of the uses and purposes*** to which it is adapted and ***for which it is capable of being used***See Association’s Brief at p. 7; Emphasis added.

In the present case a purchaser in the private sector would have confronted the same absence of information as Appellee regarding the possibility that Appellants’ property might be rezoned to, and developed in accordance with, a nonresidential zoning classification. Thus, a price arrived at on the open market could not have included this component of Appellants’ subjective valuation. It would be patently unfair, and contrary to both the letter and intent of MCL 213.55(3), if Appellee was nevertheless required to arrive at, and be bound by, a pre-filing determination of just compensation without benefit of valuation factors known only to the landowner.

The Association claims that the rulings of the Courts below cannot stand because they fail to properly account for the facts that: (1) zoning may change at any time; (2) a Michigan property owner has no vested interest in an existing zoning ordinance and no protected interest in a rezoning, and; (3) an existing use may be continued even in the face of a subsequent zoning change. See Association’s Brief at pp19-20. None of these facts supports the Association’s argument. While zoning may change, a condemning authority is required to value the property it seeks to acquire in accordance with conditions existing at the time of the taking. MCL 213.70(3). Further, if a

landowner has no protected interest in a rezoning and a condemning agency has no reason to believe that a rezoning is contemplated or possible, the landowner disclosure requirement of MCL 213.55(3) is even more crucial to fair determinations of just compensation. Finally, the key distinction between a lawful non-conforming use and the Appellee's hypothetical, non-authorized, development in this case is that the former would be ascertainable upon a condemning agency's inspection. The latter was known only to the landowner.

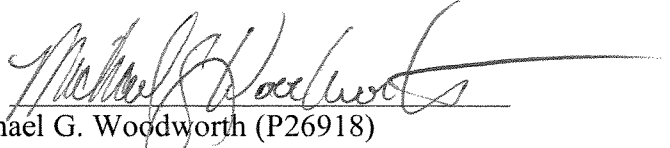
CONCLUSION

In amending MCL 213.55 by adding subsection (3), the Legislature gave a condemning agency an opportunity to reduce, or at least knowingly assume, the risk of paying for a landowner's attorney fees enhanced by wide discrepancies between the agency's original good faith offer and the amount of just compensation ultimately awarded. Following this amendment landowners and their counsel are no longer rewarded for harboring claims of additional value and revealing these claims only when it is too late for the agency to effectively amend its pre-filing offer to address them. Both the trial court and the Court of Appeals correctly identified and gave effect to this Legislative purpose. On the facts of this case, the literal language of MCL 213.55(3) permits no other result. Appellant's Application for Leave to Appeal should be denied.

Respectfully submitted,

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July 31, 2006

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